

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

ROGER D. MITCHELL,

Plaintiff,

v.

Case No. 2:08-cv-01244

MRS. JILL PEREZ,
MRS. REBECCA CORNETT,
MR. GEORGE J. COSENZA,
MR. THOMAS EVANS,
JANE DOE, and
JOHN DOE,

Defendants.

MEMORANDUM OPINION AND ORDER

This action was previously referred to Mary E. Stanley, United States Magistrate Judge, who submitted her Proposed Findings and Recommendation ("PF&R") pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) on November 13, 2008. Also pending is the plaintiff's letter-form motion for appointment of counsel, filed November 13, 2008.

The court has reviewed the PF&R entered by the magistrate judge. The magistrate judge recommends that the court deny the plaintiff's application to proceed without prepayment of costs and fees. The magistrate judge further recommends that the court dismiss this civil rights action without prejudice on the

grounds that (1) if the plaintiff is seeking money damages because he was wrongfully convicted, he has failed to state a claim upon which relief can be granted, and (2) if the plaintiff is seeking to be released from custody because of alleged violations of his federal constitutional rights, he has failed to demonstrate that he has exhausted his state remedies.

The plaintiff filed his letter-form motion for appointment of counsel on November 13, 2008, and subsequently responded to the PF&R on November 18, 2008. In his response to the PF&R, the plaintiff states that he "agrees and concedes he has insufficiently stated his relief sought. This is due to the fact the plaintiff is not an attorney and is not sure as to what the law would permit to be recovered in a grave matter as this. As for the plaintiff not exhausting all of the states (sic) post conviction § 53-4A-1 requirements. (sic) This is also true and correct."

Inasmuch as the plaintiff has essentially conceded that he has failed to state a claim upon which relief can be granted, and further inasmuch as the plaintiff has conceded that he has failed to exhaust his state remedies, it is ORDERED that:

1. The PF&R be, and it hereby is, adopted by the court;
2. Plaintiff's application to proceed without prepayment


of fees be, and it hereby is, denied;

3. This action be, and it hereby is, dismissed without prejudice; and

4. The plaintiff's letter-form motion for appointment of counsel be, and it hereby is, denied as moot.

The Clerk is directed to forward copies of this written opinion and order to the pro se plaintiff, all counsel of record, and the United States Magistrate Judge.

DATED: December 10, 2008



John T. Copenhaver, Jr.
United States District Judge